(2)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

No, 99 - 98-835V

- TERRY WILLIAMS,

Petitioner-Appellee,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent-Appellant.

On Petition For A Writ of Certiorari To the
Court Of Appeals For the Fourth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner Terry Williams, by counsel, respectfully requests leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

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PETITION FOR A WRIT OF CERTIORARI

Imminent Execution Scheduled (April 6, 1999)

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Brian A. Powers *
Ellen O. Boardman
Dinah S. Leventhal
O'Donoghue & O'Donoghue
4748 Wisconsin Avenue, N.W.
Washington, DC 20016
(202) 362-0041

Counsel for Petitioner

* Counsel of Record

CAPITAL CASE

QUESTIONS PRESENTED

1. Where both the federal district court judge and state trial court judge who had originally sentenced Petitioner to death concluded that counsel's deficient performance was prejudicial under the test this Court articulated in Strickland v. Washington, did the Fourth Circuit err in denying relief by reformulating the Strickland test so that:

   a. ineffective assistance of counsel claims may be assessed under the "windfall" analysis articulated in Lockhart v. Fretwell even where trial counsel's error was no"windfall"; and

   b. the petitioner must show that absent counsel's deficient performance in the penalty phase, all twelve jurors would have voted for life imprisonment, even where state law would have mandated a life sentence if only one juror had voted for life imprisonment; and

   c. the petitioner cannot prevail without showing that, absent counsel's deficient performance in the penalty phase, the mitigating evidence would have outweighed the aggravating evidence even though the jurors who originally sentenced petitioner were free to impose a life sentence even if the aggravating circumstances outweighed the mitigating circumstance?

2. Did the Fourth Circuit err in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot be "contrary to" clearly established Federal law as determined by the Court unless it is in "square conflict" with a decision of this Court that is "controlling as to law and fact"?

3. Did the Fourth Circuit err in concluding that, under 28 U.S.C. § 2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot involve "an unreasonable application of" clearly established Federal law as determined by the Court unless the state court's decision is predicated on an interpretation or application of relevant precedent that "reasonable jurists would *all* agree is unreasonable"?

4. Does the Fourth Circuit's interpretation of 28 U.S.C. § 2254(d)(1), if statutorily sound, nonetheless violate Article III of the United States Constitution by improperly limiting the responsibility of federal courts to decide questions of federal constitutional law?

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No. 99 -

TERRY WILLIAMS,

Petitioner-Appellee,

v.

JOHN TAYLOR, Warden,
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Respondent-Appellant.

On Petition For A Writ of Certiorari to the
Court Of Appeals For the Fourth Circuit

Imminent Execution Scheduled (April 6, 1999)

Terry Williams ("Williams" or "Petitioner"), a Virginia capital inmate, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which reversed the District Court's grant of his petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998). The opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division, is styled Williams v. Pruett, CA-97-1527-A (April 7, 1998), and is reprinted in Appendix 1 to the instant petition. The opinion of the Virginia Supreme Court rejecting the recommendation of the Circuit Court of the City of Danville to grant the writ of habeas corpus and

direct a new sentencing hearing is reported at Williams v. Warden, 487 S.E.2d 194 (Va. 1997). The opinion of the Circuit Court of the City of Danville is styled Williams v. Netherland, Case No. LP88-81 (Aug. 15, 1996), and is reprinted in Appendix 2 to the instant petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit denying the writ of habeas corpus issued on December 18, 1998. The petition for rehearing and rehearing *en banc* was denied on January 22, 1999. Thereafter, on February 10, 1999, the state court entered an order setting Williams's date of execution for April 6, 1999.

Accordingly, he filed a Motion to Recall the Mandate and to Stay the Execution with the Fourth Circuit, which was denied on March 3, 1999. Williams is filing a motion for a stay of execution in this Court contemporaneously herewith. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), petitioner having asserted below and herein a deprivation of his rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the United States Constitution, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

2. This case also involves the Fourteenth Amendment to the United States Constitution which applies the Sixth Amendment to the states and which provides, in pertinent part:

> No . . . State [may] deprive any person of life, [or] liberty . . . without due process of law.

3. This case also involves the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. In pertinent part, the AEDPA, 28 U.S.C. § 2254(d)(1) provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States . . . .

STATEMENT OF THE CASE

A. The Trial and Sentence

On November 3, 1985, Harris Stone was found dead in his bed. His death was not considered a homicide. The local medical examiner found no evidence of foul play and, based on Stone's 0.41% blood alcohol level, determined that he died of alcohol poisoning. Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361, 363 (Va. 1987).

While in the Danville City Jail on a petit larceny charge in the spring of 1986, and while experiencing bizarre dreams and nightmares, Williams approached the police and confessed that he had struck Stone with a garden implement known as a mattock, and taken his wallet containing three dollars. Id. (See also JA 148-49, 156.)[1] Based on this confession and an autopsy of Stone's remains, which revealed a fractured rib and punctured lung consistent with a blow to the chest from a mattock, Williams was indicted for capital murder. Williams, 360 S.E.2d at 363.

At the conclusion of a two-day trial conducted on September 29 and 30, 1986, Williams was found guilty of both capital murder and robbery. At the sentencing hearing, the Commonwealth presented evidence of Williams's criminal record and the testimony of two psychiatric experts,

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[1] "JA" and "SJA" references are to the Joint Appendix and Supplemental Joint Appendix, respectively, filed with the appeal in the United States Court of Appeals for the Fourth Circuit, and reprinted in Appendix 3 to the instant petition.

including Dr. Arthur Centor from Central State Hospital, that Williams was a future danger, a conclusion that contradicted his pre-trial report to defense counsel. (JA 172; SJA 42.)

Williams's lead trial counsel -- who, at about the time of the trial, was in the throes of a Virginia State Disciplinary Board proceeding that resulted in a private reprimand (JA 211, 237-38, 240) -- waited until approximately one week before trial to begin preparing his sentencing case. (JA 279.) His investigation primarily consisted of very general questions of Williams and his mother, a woman with a fourth grade education. (JA 504, 510.) As a result, counsel came up with virtually nothing to present to the jury. Having failed to conduct a reasonable investigation of mitigating circumstances, trial counsel offered the jury only the testimony of Williams's mother and two former neighbors (one of whom he plucked from the courtroom audience at the last minute to testify) that Williams was "a nice boy," had never said a "bad word" in their presence, and had never hurt or threatened anyone in their presence. (JA 189-90, 194, 199, 202, 204, 469.) Trial counsel also offered the tape-recorded lay testimony of a psychiatrist that Williams had told him that he had taken the bullets out of a gun during an armed robbery so as not to hurt anyone, and felt he had been unfairly convicted of a crime in 1982. (JA 185-86.)[2] Based on this weak and useless testimony, the jury sentenced Williams to death.

B. The Direct Appeal

The Virginia Supreme Court affirmed the conviction and sentence of death on direct appeal on September 4, 1987. Williams v. Commonwealth, 234 Va. 168, 360 S.E.2d 361 (Va. 1987).

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[2]As the District Court observed, "[t]he testimony of all four witnesses covers approximately twenty pages of the transcript [of the sentencing proceeding], and does not mention anything about petitioner's childhood, mental ability, or anything else enumerated [in the omitted mitigation evidence]." (App. 1 at 25.)

Thereafter, the United States Supreme Court denied Williams's petition for a writ of certiorari with Justices Brennan and Marshall dissenting. Williams v. Virginia, 484 U.S. 1020 (1988).

C. The State Habeas Proceedings

1. Danville Circuit Court

Williams filed a petition for a writ of habeas corpus with the Circuit Court for the City of Danville on August 26, 1988. Although the Circuit Court dismissed most of Williams's claims, it granted him leave to amend his petition to add several claims regarding his trial counsel's ineffectiveness, including those relating to his trial counsel's mental disability which had led the Virginia State Bar Disciplinary Board to indefinitely suspend his license to practice law in September 1989. (JA 211, 237-38, 240, 873, 878-79, 881.) See also Williams v. Taylor, 163 F.3d 860, 864, 871 (4th Cir. 1998).

On June 15 and 16, 1995, the Danville Circuit Court conducted an evidentiary hearing on these claims. The undisputed evidence produced at the evidentiary hearing reflected that trial counsel had ignored substantial and readily-available mitigation evidence largely because he did not think to locate it, or erroneously believed with respect to certain records that the law did not permit him to obtain them.

Among other things, trial counsel failed to produce Williams's family services records, which, with focused inquiries of Williams's family members, would have revealed that:

- Williams was born at home, at only four pounds, to a woman who admittedly drank herself into a stupor with bootleg liquor almost daily while pregnant (JA 504-07);
- when Williams was one year old, he and his siblings were found by police and social services workers at home hungry and unclothed; surrounded by feces, urine, and filth; and ignored by drunken parents; and, consequently, were removed from their parents' custody (JA 507-08, 718-23, 901);

- Williams's mother was subsequently imprisoned for child neglect (JA 911-19), and for two years, Williams and his siblings remained in foster care homes, in one of which, his sister Olivia stated, they were treated "very badly" (JA 901);

- following Williams's return home, his father, Noah Williams, Sr., continued to drink heavily and frequently beat up Williams's mother (JA 520, 902); and witnessing these "hard fist fights" left Williams "huddle[d] up in the corner shaking, crying" (JA 520);

- the Danville Public School Home Visitation Reports reflected that Williams's "parents show no interest in the school program nor the children," "[t]he children are without food and proper clothes often" (SJA 39), and "[t]here are many home problems" (SJA 39; JA 902);

- as a child, Williams's father regularly tied him to a bed or held him "buck naked" so he could whip him with a belt or a switch (JA 509, 518, 896); and

- to avoid beatings by his father, Williams would spend the night outside hiding under boxes rather than come home (JA 522-23, 899, 903).[3]

Trial counsel also did not think to obtain Williams's correctional records. (JA 266.) Had he done so, he would have learned, or could have discovered through further investigation, that:

- while confined to various juvenile facilities as a youth, Williams exhibited positive behavior, did as he was told, and "[t]rie[d] extremely hard to please" (JA 727);

- Williams was "able to function very well in [Beaumont juvenile facility's] environment of routine controls" (JA 746);

- Williams was upgraded to "A custody" while at Patrick Henry Correctional Unit in Spencer, Virginia in the mid-1970s, meaning that "he was among those prisoners considered least likely to act in a violent, dangerous or provocative way" (JA 887-88);

- Williams was promoted to the Good Conduct Allowance ("GCA") Class I at Patrick Henry "due to exemplary reports from staff" (JA 937);

- Williams was eligible for work release during the final months of his stay at Patrick Henry, a status that required him to have a good prison record, "highly favorable staff evaluations," and the approval of the Richmond Central Classifications Office (JA 888-89);

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[3]As the District Court recognized, "Petitioner's childhood was particularly troubled. It is clear that Petitioner was not provided with basic necessities from a very early age." (App. 1 at 21.)

- Williams's positive response to a structured environment was specifically noted in an April 1982 psychological summary conducted of Williams by the Virginia Department of Corrections, which stated that Williams "appears to have experienced a traumatic, neglected childhood," and appeared to be "an individual without ingrained criminal tendencies who lacks the coping skills necessary to function as an independent adult" (JA 924);

- Patrick Henry's Assistant Superintendent Jimmie Joyce personally encountered Williams in the mid-1980s at the Chatham Correctional Unit, and remembered him as "a quiet, courteous, neat, cooperative and non-violent prisoner" (JA 886-89);

- Williams's "good behavior prompted the kitchen officer to select him to work in the guards' dining room," work that was given prisoners who "were regarded as trustworthy, and who did not pose a danger" (JA 886-89);

- Lt. Anthony Parrish, another correctional officer at Chatham, remembered Williams to be "cooperative and well-mannered" (JA 905);

- in January 1985, the year before Williams's trial in the instant case, Williams received an official commendation from prison officials at Chatham for returning, with all money and contents intact, a guard's lost wallet Williams had found (JA 905);

- while at Halifax Correctional Unit, where he was housed in the early 1980's, Williams reported key evidence to the authorities relating to a prison drug ring, conduct which brought another official commendation praising Williams for his extremely valuable assistance and "the concern he had for others" (JA 979); and

- Williams attended and successfully graduated from carpentry school while at the Martinsville Correctional Center in the late 1970's. (JA 883.)[4]

Trial counsel also did not present evidence that Williams was borderline mentally retarded (App. 1 at 24). Nor did he investigate Williams's current relationships, including those with his wife and daughter. (Id.) Had he done so, he would have learned that Williams had an eleven-year old child, Jennie, who attended the trial proceedings with her mother, Jenny Lee Williams, both of whom would have testified, had they been asked that Williams was a loving, kind and doting father. (JA 890-94.)

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[4]Both the Danville Circuit Court (App. at 20, 43) and the District Court (App. at 26-27) found Williams's prison record significant.

Finally, trial counsel did not even return the telephone call of Bruce Elliott, a respected Harrisonburg, Virginia accountant, who had called trial counsel and offered to testify for Williams. (App. 1 at 24; JA 884.) But for trial counsel's errors, the jury would have learned that:

- Elliott, head of his own certified public accounting firm in Harrisonburg, Virginia, had befriended Williams through a church ministry program in 1978 and had remained friends with him ever since (JA 882);
- Elliott visited Williams every two to three weeks while Williams was incarcerated in the Harrisonburg facility and regularly thereafter (JA 883);
- Elliott did not consider Williams a violent person and never "felt the least bit of fear" when he was around him (JA 883, 885);
- after Williams was paroled in the early 1980s, Elliott kept in contact with him, invited him to stay in his home overnight and took him to a football game in North Carolina (JA 883); and
- Elliott continued to visit Williams even after he was incarcerated for breaking and entering, and was struck at how Williams was "always concerned about making a good impression [on] those in charge of the correctional facilities" and how he was "proud of the work he performed while incarcerated" (JA 883-84).[5]

Based on this omitted evidence, the same Danville Circuit Court judge who had initially believed that a sentence of death was "just" and "appropriate" (JA 213) concluded that trial counsel's professional errors prejudiced Williams and violated his right to the effective assistance of counsel as required by the Sixth Amendment to the United States Constitution. "[W]ith so little favorable testimony in the way of mitigation," the court concluded, "and faced with much unfavorable evidence on the question of future dangerousness, this [omitted mitigation] information could have been critical in the jury's decision as to Williams's punishment." (App. 2 at 21.)

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[5]As the Danville Circuit Court concluded, Elliott's "testimony would have portrayed petitioner as a decent human being who struggled to prove his worth in spite of his being somewhat disadvantaged mentally, emotionally and financially." "This testimony, from a well-respected professional," the court continued, "would have had an impact on the jury on the question of future dangerousness, and could have tilted a juror to favor a life sentence." (App. 2 at 20.)

Accordingly, by order entered August 15, 1996, the Circuit Court of the City of Danville issued "Proposed Findings of Fact and Recommended Conclusions of Law"[6] recommending that the writ be granted and a new sentencing hearing ordered. (App. 2. at 42-44, 49.) The Circuit Court recommended denial of all of Williams's remaining claims. (App. 2.)

2. Virginia Supreme Court

Both Williams and the Commonwealth filed objections to the Danville Circuit Court's proposed findings of fact and recommended conclusions of law. Thereafter, the Virginia Supreme Court ordered special briefing on the one issue that the Circuit Court had determined warranted relief. With respect to the remaining claims, the Virginia Supreme Court affirmed the Circuit Court's recommendation of dismissal. Following briefing and oral argument on the claim that trial counsel's assistance was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), the Virginia Supreme Court issued an opinion on June 6, 1997, disagreeing with the Danville Circuit Court's recommendation and denying the petition for a writ of habeas corpus. Williams v. Warden, 254 Va. 16, 487 S.E.2d 194 (1997).

Specifically, the Virginia Supreme Court concluded that even if Williams's trial counsel had failed to present readily available mitigation evidence -- and, as even that court recognized, "[t]here is no doubt there was such evidence; the facts really are not in dispute"[7] -- those omissions were not prejudicial. To reach that conclusion, the Virginia Supreme Court weighed the aggravating circumstances presented at Williams's trial against the omitted mitigating evidence and found that

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[6]Following the filing of post-hearing briefs, but before the Circuit Court issued its decision, the Virginia Supreme court assumed exclusive jurisdiction over the case, pursuant to newly enacted Va. Code Ann. § 8.01-654(C)(1)(Michie 1998). As such, the Circuit Court's findings and conclusions were required to be in the form of recommendations only.

[7]487 S.E.2d at 198.

"'[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence the sentence imposed.'" Id. at 200. Additionally, the Virginia Supreme Court invoked the per se "no-prejudice" rule of Lockhart v. Fretwell, 506 U.S. 364 (1993), even though trial counsel's errors in this case, unlike in Lockhart, were not "'a windfall to which the law [did] not entitle him.'" Williams v. Warden, 487 S.E.2d at 198. (quoting Lockhart, 506 U.S. at 369-70). Williams's petition for rehearing was summarily denied by the Virginia Supreme Court on August 6, 1997.

D. Federal District Court Proceedings

On December 12, 1997, Williams filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia, Alexandria Division, pursuant to 28 U.S.C. § 2254. On April 7, 1998, the District Court ordered that the writ be granted on the ground that Williams's trial counsel had been constitutionally ineffective in failing to present crucial evidence in mitigation during the sentencing phase of the proceeding. Concurring with the state habeas trial judge, the District Court concluded that:

> Given the amount of mitigating evidence not presented to the jury, the compelling nature of such evidence and the fact that none of such evidence was cumulative, the Court concludes that there is a reasonable probability that had the jury heard this evidence, at least one juror and perhaps all, would have concluded that the death penalty was not warranted.

(App. 1 at 30.)

In reaching this conclusion, the District Court concluded that the Virginia Supreme Court's decision finding no Strickland prejudice was "contrary to and involved an unreasonable application of" clearly established federal law. (App. 1 at 9-10, 14, 30-34.) Not only did the District Court find the Virginia Supreme Court's conclusion contrary to Strickland itself (App. 1 at 34), it also found error

in that court's application of Lockhart to this particular case because, unlike in Lockhart, trial "counsel's failure to introduce mitigating evidence was a right the law does recognize." (App. 1 at 33.) Finally, the District Court also found that certain of the Virginia Supreme Court's factual findings with respect to the nature and extent of the mitigating evidence were unreasonable within the meaning of 28 U.S.C. § 2254(d)(2).

E. Fourth Circuit Proceedings

The Commonwealth appealed and Williams cross-appealed from the decision of the District Court denying Williams's claims regarding trial counsel's mental illness and psychiatric experts. Affirming in part and reversing in part, the Fourth Circuit denied the writ on December 18, 1998. Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998). "[A]ssum[ing], without deciding, that Williams's trial counsel were objectively unreasonable in failing to investigate, prepare and present certain evidence in mitigation of punishment during the sentencing phase of Williams's trial," Williams, 163 F.3d at 867, the Court of Appeals found no prejudice and, in so doing, approved the Virginia Supreme Court's rationale. Id. 867-68.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FOURTH CIRCUIT'S REFORMULATED CRITERIA FOR PROVING PREJUDICE IN CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL CONFLICT WITH THIS COURT'S SETTLED JURISPRUDENCE.

Over the years, this Court has taken pains to develop the appropriate burdens of proof for habeas petitioners, the gradations of which are keyed to the constitutional right asserted. Thus, in Jackson v. Virginia, 443 U.S. 307, 324 (1979), a habeas petitioner seeking to overturn a conviction based on a claim that a verdict supported by insufficient evidence was, in and of itself, unconstitutional, faced the severe burden of showing that "no rational trier of fact" could have found him guilty beyond a reasonable doubt. Sawyer v. Whitley, 505 U.S. 333, 336 (1992), imposed the lesser, but nonetheless

exacting, "clear and convincing" burden of proof on a habeas petitioner claiming "actual innocence" as a procedural gateway to consider a successive petition. Farther down the scale,[8] but requiring still a more demanding burden than the "reasonable probability" test, are Murray v. Carrier, 477 U.S. 478 (1986), and Schlup v. Delo, 513 U.S. 298 (1995),[9] in which the Supreme Court announced the rule that a habeas petitioner asserting "actual innocence" as a gateway to review on the merits of his claim of constitutional error must show that it is "more likely than not" that no reasonable juror would have convicted him in light of the new evidence. Near the bottom of this scale is the "reasonable probability" test announced in Strickland.[10] While, under this standard as the Court explained, a petitioner must show something more than "that the errors had some conceivable effect on the outcome of the proceeding," he is not required to prove that "counsel's deficient conduct more likely than not altered the outcome in the case" to establish prejudice. Strickland, 466 U.S. at 693-94 (emphasis added).

In Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), the Fourth Circuit misapplied Strickland's "reasonable probability" rule of law in a way that effectively heightens the "reasonable probability" test for determining prejudice and thus the existence of constitutional error. Specifically, the court wrongly accepted the Virginia Supreme Court's use of Lockhart v. Fretwell, which created

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[8]Carrier's and Schlup's "more likely than not" standard imposes a lower burden of proof than the "clear and convincing" standard required under Sawyer. Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 151 (1995).

[9]As the Supreme Court explained in Schlup, "[t]hough the Carrier standard requires a substantial showing, it is by no means equivalent to the Jackson standard that governs review of claims of insufficient evidence." Schlup, 115 S. Ct. at 868.

[10]See also United States v. Bagley, 473 U.S. 667, 678 (1985) (a "reasonable probability" of a different result is "not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.")

a "windfall" exception to Strickland, for evaluating prejudice. The court also wrongly concluded that prejudice cannot be shown even if "one hypothetical juror might be swayed by a particular piece of evidence," a proposition that substantially elevates the prejudice calculus for Fourth Circuit litigants given that all it takes under Virginia law is the vote of one juror to defeat a sentence of death.[11] Finally, the court wrongly applied Strickland to approve the Virginia Supreme Court's creation and application of a rule that prejudice can never be shown if aggravating circumstances outweigh mitigating circumstances even if the sentencer, as was the case for Williams, never "weighed" the evidence in the first instance to determine the sentence.

In so deviating from the constitutional principles established by this Court in Strickland for establishing prejudice in this case, the Fourth Circuit has effectively imposed on Williams a burden more akin to the "clear and convincing evidence" standard of Sawyer or, at the very least, the impermissibly harsher "more likely than not"[12] standard of Schlup and Carrier. As shown below, the Fourth Circuit's misguided approach to determining prejudice does substantial damage to this Court's established habeas jurisprudence as articulated in Strickland and significantly erodes the Sixth Amendment's guarantee of counsel. These errors reflect a systemic dysfunction, and the Fourth Circuit's recurring trend in applying Strickland in such a fashion portends dire consequences for habeas litigants who seek to challenge their death sentences on the grounds of ineffective assistance of counsel. In short, because the only means of correction lies with this Court, certiorari should be granted.

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[11]Williams, 163 F.3d at 868.

[12]The "more likely than not" standard is "a stronger showing than that needed to establish prejudice" under Strickland. Schlup, 115 S. Ct. at 867 & n.45.

A. This Court Intended to Limit the Lockhart v. Fretwell Test of Prejudice to the Rare Case Where the *Strickland* Test Would Give the Petitioner an Underserved "Windfall."

In finding no prejudice from trial counsel's failure to investigate, present and prepare mitigation evidence, the Virginia Supreme Court concluded, in reliance on Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993), that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to which the law does not entitle him." 487 S.E.2d at 198. In finding no error in the Virginia Supreme Court's absorption of Lockhart into the mainstream Strickland analysis, the Fourth Circuit effectively approved of the use of a "windfall" analysis to evaluate ineffectiveness claims that are predicated on an attorney error that Williams had every right to claim -- namely, the right to have the jury consider, in deciding whether Williams would live or die, the compelling and substantial mitigation evidence that was available to but ignored by his trial counsel.

Strickland posited the following inquiry to determine whether counsel was constitutionally ineffective: was counsel s conduct professionally unreasonable, and is there a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different? 466 U.S. at 694. Seven years later, Lockhart presented the Court with an extraordinary set of facts to which Strickland's two-prong test did not readily apply. 506 U.S. at 371.

In Lockhart, trial counsel's alleged deficient performance was his failure to raise an objection which would have been legally valid if made at the time of trial, but which had been rendered invalid by the time of the state habeas hearing. Id. at 366. Applying Strickland, the lower court determined that trial counsel's error was professionally deficient and, but for counsel's error, the result of the proceeding would have been different. Id. at 367. Finding unpalatable the notion that a petitioner could obtain Strickland relief based on a performance deficiency that was no more than trial counsel's

failure to invoke for his client "a right the law simply does not recognize," Nix v. Whiteside, 475 U.S. 157, 186-87 (1986) (Blackmun, J., concurring), the Court in Lockhart created an exception to Strickland's "reasonable probability" test to ensure that Strickland did not provide a "windfall" to the petitioner. 506 U.S. at 370. In so crafting this "windfall" exception, the Court specified that if the complained-of deficient performance was an error to which the petitioner ultimately had no legal right, no prejudice will be found. Id. at 371.

This seemingly automatic finding of no prejudice in the face of an admitted attorney deficiency clearly makes Lockhart the exception to Strickland, not merely "a clarification" of Strickland, as the Fourth Circuit claimed. Williams, 163 F.3d at 869. In Strickland, the rule is that an unprofessional attorney error, but for which there is a reasonable probability that the outcome would be different, is sufficient to show prejudice. Lockhart, on the other hand, held that where an attorney unprofessionally fails to take an action to which the defendant has no current legal entitlement, there is no legal prejudice even if there is a reasonable probability that the outcome of the proceeding would have been different, because to grant the relief under those circumstances would give the petitioner a "windfall."

Indeed, as Justice O'Connor, the author of the majority opinion in Strickland, observed, the Court's Lockhart decision

> will, in the vast majority of cases, have no effect on the prejudice inquiry under Strickland v. Washington, [citation omitted]. The determinative question whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," Id. at 694, remains unchanged. This case, however, concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.

Lockhart, 506 U.S. at 373 (O'Connor, J., concurring).[13]

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[13]The Fourth Circuit's attempt to discount Justice O'Connor's characterization of Lockhart as applicable only to the "unusual" case, 163 F.3d at 869, is weak, indeed. The fact that Lockhart's author,

Rather than see Lockhart for the unique situation it presented and limit it accordingly, the Virginia Supreme Court seized on it as a tool to reject Williams's straightforward application of Strickland -- namely, that there was "a 'reasonable probability' that at least one juror would have been moved to spare Williams's life had he heard" the mitigation evidence trial counsel never thought or sought to develop -- as an unacceptable outcome determinative analysis. Williams v. Warden, 487 S.E.2d at 194, 199 (Va. 1997).

In so concluding, the Virginia Supreme Court plainly likened Williams's trial counsel's failure to investigate, prepare and present substantial and compelling mitigation evidence to an attorney error from which Williams had no right to escape. As the District Court correctly recognized in this case, however, Williams

> is entitled, by current law, to have all possible mitigating evidence put before the sentencing jury. Williams has demonstrated that there was significant additional mitigating evidence that was not offered to the jury at sentencing. Williams has satisfied the prejudice inquiry by showing not only a reasonable probability that "the outcome would have been different but for counsel's error," but, unlike Lockhart, also that counsel's failure to introduce mitigating evidence was a right the law does recognize.

(App. 1 at 32-33.)

Finally, contrary to the Fourth Circuit's conclusion, 163 F.3d at 866-67, in raising this challenge to the Virginia Supreme Court's reliance on Lockhart's "windfall" exception, Williams does not take issue with the observation in both Lockhart and Strickland that the ultimate inquiry in determining prejudice is whether the result of the proceeding was "fundamentally unfair" or "unreliable." In circling the wagons to preserve this rather unremarkable and elementary proposition,

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Chief Justice Rehnquist "made no such disclaimer," id., about the limitations of Strickland is hardly the point. Rather, what is significant is that the Chief Justice took no issue with Justice O'Connor's limitation of Lockhart, effectively acquiescing in her characterization of the decision, deference that was appropriately due her as Strickland's author.

the Fourth Circuit has missed Williams's point entirely. Rather than challenging the concept of "fundamental reliability" or "fairness," Williams embraces it as the hallmark of the type of meaningful and fair review that has eluded him on appellate review. Indeed, if "fundamental reliability" or "fairness" was truly all that Lockhart added to Sixth Amendment jurisprudence, Williams would have prevailed in the Fourth Circuit because, as the District Court and the Danville Circuit Court before it both recognized, Williams's death sentence is a fundamentally unfair and unreliable result given his attorneys' unprofessional performance in failing to investigate and present substantial mitigating evidence. Williams had a Sixth Amendment right to his counsel's effective performance in this regard, and preserving that right would give him no "windfall," only that to which he is entitled under a fair system of collateral review.

B. Where the Vote of One Juror Would be Enough to Result in a Different Outcome, the Fourth Circuit Stands Alone in Requiring the Petitioner to Provide Prejudice by Showing that All Twelve Jurors Would Have Changed their Votes.

In Strickland, the Supreme Court concluded that to show constitutional prejudice, there must be "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland, 466 U.S. at 694. A "reasonable probability," the Court continued, is "a probability sufficient to undermine confidence in the outcome." Id. Applying this rule of law to the fact that, in the Commonwealth of Virginia, a unanimous jury is required to impose a sentence of death, the District Court concluded that "there is a reasonable probability that had the jury heard [the omitted mitigation evidence] at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (App. 1 at 30.)[14]

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[14]The Danville Circuit Court similarly concluded that the omitted mitigation evidence "could have tilted a juror to favor a life sentence." (App. 2 at 20) (emphasis added).

Rather than view the District Court's remarks as a straightforward application of Strickland's prejudice requirement to Virginia's capital sentencing scheme which requires unanimity to impose a sentence of death,[15] the Fourth Circuit concluded that Strickland prejudice cannot be shown even if "one hypothetical juror might be swayed by a particular piece of evidence," Williams, 163 F.3d at 868, and thus rejected the District Court's granting of the writ.

In so finding, the Fourth Circuit has, in effect, rewritten Virginia's capital sentencing scheme to impose a far heavier burden than the law requires. Thus, while no one disputes that the Virginia capital sentencing statute bars a sentence of death from being imposed if even one juror objects, the Fourth Circuit insists that the sentencing statute be ignored for purposes of determining Strickland prejudice in a post-conviction proceeding. Quite simply, in the Fourth Circuit, it is not enough for a habeas petitioner to satisfy the "reasonable probability-that-the-outcome-would-have-been-different" test by showing that "one hypothetical juror might be swayed by a particular piece of evidence," even if that juror is the quintessential reasonable, conscientious and impartial juror. Rather, in the Fourth Circuit, a habeas petitioner can demonstrate Strickland prejudice only if he can sway "twelve reasonable, conscientious, and impartial jurors." Williams, 163 F.3d at 868.

The Fourth Circuit's refusal to look at the "effect-on-one juror" for determining Strickland prejudice is contrary to authority in its sister circuits and thus presents a conflict fully ripe for this Court's adjudication. The Seventh Circuit, for example, appropriately factors in to Strickland's "reasonable probability" test the mathematical and undisputable probabilities inherent in a state sentencing scheme that takes just one juror -- as always, the quintessential reasonable, conscientious

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[15]See Va. Code Ann. §19.2-264.4(E) (Michie 1998). ("In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life").

and impartial juror -- to change the outcome of a sentence.[16] Thus, in Kubat v. Theriet, 867 F.2d 351, 369 (7th Cir. 1989), the Seventh Circuit held that trial counsel's failure to present available and compelling mitigation evidence at the sentencing phase, including the testimony of a law enforcement officer, was prejudicial because "if just one juror had been sufficiently influenced by the character testimony, the death penalty could not have been imposed." Likewise, in Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996), the Seventh Circuit honed in on the devastating impact of trial counsel's failure to present any mitigation evidence on petitioner's behalf at the sentencing phase of his capital murder trial. "[W]ith need to convince only one of twelve jurors to refuse to go along with a death sentence," and given the "irrefutable evidence of aggravating circumstances," the court concluded that the possibility that the omitted mitigation evidence "might have saved [Emerson] from the death penalty cannot confidently be reckoned trivial." Id. at 907. As the court explained,

> [t]he mitigation specialists' 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors . . . as to reduce Emerson's moral responsibility for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think Emerson deserving of mercy.

Id. (Emphasis added.)

Similarly, in Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992), the Ninth Circuit approved the "effect-on-one-juror" approach wrongly dismissed by the Fourth Circuit. In assessing "reasonable probability" for purposes of determining Strickland prejudice, the Ninth Circuit appropriately

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[16]This approach is fully consistent with that utilized by the Supreme Court in making such evaluations. In Schlup v. Delo, 513 U.S. 298, 329 n.48 (1995), for example, the Supreme Court recognized the utility and necessity of employing "probabilistic determinations" about the "likely actions of hypothetical 'reasonable' actors" in evaluating habeas claims. Indeed, the Court in Schlup did just that, finding that, because it was "more likely than not" that "a juror, conscientiously following a judge's instructions requiring proof beyond a reasonable doubt, would [not] vote to convict," id. at 331 (emphasis added), based on the proffered evidence of actual innocence, the petitioner's constitutional claim should be heard on the merits and not be deemed defaulted.

recognized that "the death penalty could not be imposed if even one juror was not convinced beyond a reasonable doubt that it should be." Id. at 620. Accordingly, the court concluded, "but for the deprivation of counsel's effective assistance at the penalty phase, the result would have been different.'" Id. (quoting 754 F. Supp. at 1501). As with its sister circuit in Kubat and Emerson, the Ninth Circuit recognized the need to assess prejudice for Strickland purposes in the applicable legal context of the state's sentencing scheme -- namely, that upon the objection of one juror, a sentence of death cannot issue. See also Harris v. Blodgett, 853 F. Supp. 1239, 1270 (W.D. Wash. 1994) (in a state that requires unanimity for a sentence of death, "[i]f a defendant can show that counsel's deficient performance by failing to present other mitigating evidence would have allowed any juror to vote against the death penalty, then he has shown that the result would have been different. This is known as the 'effect-on-one-juror approach.'"); Jones v. State, 504 S.E.2d 822, 830 (S.C. 1998) (Finney, C.J., dissenting) (reversible error for trial court to have sentenced petitioner to death "without the benefit of having the trial judge submit to the jury a mitigating circumstance to which he was entitled and which could have swayed the jury, or even one juror, to impose life despite the aggravating circumstances in this case"), petition for certiorari filed Jan. 5, 1999 .

Finally, in Bertolotti v. Dugger, 883 F.2d 1503 (11th Cir. 1989), the Eleventh Circuit, although it denied the writ, clearly accepted the notion that for purposes of capital sentencing one juror can make a difference. The court noted that the jury had voted nine to three to recommend the death penalty; thus, "had three jurors voted differently, the recommendation would have been for life." Bertolotti, 883 F.2d at 1519 n.12. Rejecting "the argument that analysis of the 'reasonable probability' of a different verdict should vary according to the number of jurors voting to impose the death penalty," the court explained that "if there is a reasonable probability that one juror would change his

or her vote, there is a reasonable probability that a jury would change its recommendation." Id. *A fortiori*, in a system such as Virginia's that requires a unanimous verdict to impose the death penalty, the shift in one juror's vote would most certainly change the outcome of the proceeding.

In short, what is "reasonable probability" for purposes of determining Strickland prejudice in any given case depends, as it must, on the variables of the sentencing scheme. Clearly, it is easier to persuade one reasonable, conscientious, and impartial juror to hold out for life than it is to persuade twelve such individuals to do so and that is precisely what Virginia's capital sentencing scheme envisions by requiring unanimity as a predicate for a sentence of death.[17] A prejudice analysis that recognizes that elementary fact is precisely what Strickland requires.[18] Both the state court judge -- the same judge who originally sentenced Williams to death -- and the federal district court judge concluded that there is a "reasonable probability" that the substantial and compelling mitigation evidence that trial counsel ignored in this case would have changed the vote of at least one juror and thus produced a sentence of life, not death. The Fourth Circuit's rejection of this obvious conclusion -- concurred in by not one but two trial judges whose daily exposure to jurors and their reactions at trial make their conclusions in this case particularly noteworthy -- based on its plainly incorrect reading of Strickland, underscores the heightened burden the Fourth Circuit imposes on habeas litigants. This burden finds no place in the law of this Court and compels correction.

That the Fourth Circuit relied on Strickland to justify its erroneous rejection of the "effect-on-one-juror" approach further underscores its attempt to erode Strickland. Strickland stands only for the proposition that "[t]he assessment of prejudice should proceed on the assumption that the decisionmaker

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[17]Va. Code Ann. § 19.2-264.4(E).

[18]466 U.S. at 695 (governing legal standard of state sentencing scheme provides measure for "reasonable probability" of different outcome).

is reasonably, conscientiously, and impartially applying the standards that govern the decision" and that the decisionmaker "acted according to law." Strickland, 466 U.S. at 694-95.[19] It does not, as the Fourth Circuit urges, "stand for the proposition that a court cannot consider the effect of counsel's deficient performance on a single juror." Mak v. Blodgett, 970 F.2d 614, 621 (9th Cir. 1992). And it certainly does not stand for the proposition implicitly advanced by the Fourth Circuit that any juror who would have voted for life in this case could not have been acting "reasonably, conscientiously, and impartially" or according to law.[20]

C. The Fourth Circuit Failed to Honor the Distinction between a Weighing and a Non-Weighing State and thereby Imposed a Heightened Burden on Petitioners in Non-Weighing States.

In finding that Williams suffered no prejudice from his trial counsel's failure to investigate, prepare and present mitigating evidence for the jury's consideration during sentencing, the Virginia Supreme Court, quoting Strickland, concluded that

> '[g]iven the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating

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[19]Thus, the Strickland Court cautioned with respect to the particular facts before it, whatever the sentencing judge's particular sentencing practices might have been in the case below, they are "irrelevant to the prejudice inquiry." 466 U.S. at 695.

[20]The Fourth Circuit's distortion of Strickland is nowhere more evident than from a review of the context in which the "reasonabl[e], conscientious[], and impartial[]" juror language arose. The Court sought to answer the very narrow question whether the district court erred in allowing, at the federal habeas evidentiary hearing, state trial court judge who sentenced Strickland to testify in support of the state's case that the omitted mitigation evidence would have made no difference to the outcome. See 466 U.S. at 683, 695. The Court explained that the particular propensities of the specific judge were irrelevant to the determination of prejudice which should be decided objectively on the basis of what a reasonably prudent decisionmaker would conclude. This limited finding, however, that a "particular judge's sentencing practices," id. at 695, are irrelevant to the question of prejudice by no means supports the far different proposition advanced by the Fourth Circuit that prejudice cannot be determined even where there is a "reasonable probability" that one juror would have voted for life. Such plain overreaching is further evidence of the unprincipled erosion of the "reasonable probability" test for showing prejudice in the Fourth Circuit.

> circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.' 466 U.S. at 700.

487 S.E. 2d 194, 200 (Va. 1997). Williams argued on appeal to the Fourth Circuit that the Virginia Supreme Court wrongly "weighed" the mitigating evidence that Williams's defense counsel should have presented against the aggravating evidence the Commonwealth presented. Such "weighing" of evidence in a state that does not utilize the "weighing" of evidence to impose a sentence of death, Williams argued, was clearly contrary to or an unreasonable application of clearly established federal law, and was thus due no deference under the AEDPA.

The Fourth Circuit disagreed. Notably, while the Fourth Circuit acknowledged that the Virginia Supreme Court did, in fact, "weigh" the aggravators against the mitigators to affirm the penalty of death, it concluded that such "weighing" was unrelated to any particular state sentencing scheme and was thus generally applicable to evaluate prejudice in all cases. Williams v. Taylor, 163 F.3d at 860, 870 (4th Cir. 1998). As such, the Fourth Circuit maintained, the Virginia high court's usage of the term "outweighed" was only in its "ordinary sense," 163 F.3d at 870, no different it contends than the Supreme Court's usage of the term in Strickland. The Fourth Circuit's conclusion, however, is wholly belied by the legal and factual underpinnings of Strickland and cannot save the Virginia Supreme Court's fatally-flawed analysis.

Moreover, the Fourth Circuit's decision undermines the bedrock principles of Strickland that the "governing legal standard"[21] of the state sentencing scheme provides the rod by which the "reasonable probability" of a different outcome but for counsel's errors may be measured. To ignore this "governing legal standard" and substitute in its place an all-purpose, fungible test that requires a finding of prejudice if aggravators outweigh mitigators effectively rewrites the rule of "reasonable probability" mandated

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[21] Strickland, 466 U.S. at 695.

by this Court, a result that does substantial damage to this Court's jurisprudence and which can only be corrected through a grant of certiorari.

1. The Virginia Supreme Court and the Fourth Circuit misapprehended and misapplied *Strickland*'s rule of law.

In Strickland, Justice O'Connor, writing for the majority, set the stage for the Court's ultimate holding by undertaking three tasks distinctly categorized in her decision: first, setting forth a detailed recitation of both the facts and the history of the case and the governing state capital sentencing law (466 U.S. at 671-84); second, articulating the rule of constitutional law to be applied henceforth to Sixth Amendment claims of ineffective assistance of counsel (466 U.S. at 684-98); and third, applying the new rule of law to the facts of the case (466 U.S. at 698-701).

As to the first task, the Court described, among other things, the basis of trial court's findings in support of the death sentence, quoting from the Florida Supreme Court's decision:

> With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigation circumstances . . . to outweigh the aggravating circumstances." See Washington v. State, 362 So.2d 658, 663-64 (Fla. 1978).

466 U.S. at 675. The crucial missing text in the above quote, signified by the ellipsis, is the citation to the Florida sentencing statute, Fla. Stat. Ann. § 921.141(b), which requires the jury to determine whether there are "insufficient mitigating circumstances to outweigh the aggravating circumstances" to impose a sentence of death. Florida's "weighing" statute requires the trial court then to "set forth in writing its findings upon which the sentence of death is based as to the facts . . . that there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla. Stat. Ann. § 921.141(3)(b) (West 1998).

Having articulated the narrow rule of law -- namely, that to overturn a state court decision based on a claim of ineffective assistance of counsel, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"[22] -- the Court was then required to apply it to the facts of the case. "The governing legal standard plays a critical role" in that application, it determined. Id. at 695. As the Court further explained,

> [w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence, such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695 (emphasis added). Answering that question based on the particular facts and state sentencing law presented, the Court concluded that "there is no reasonable probability that the omitted evidence would have changed the conclusion [of the trial court] that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." Id. at 700.

In short, Strickland makes clear that the prejudice analysis undertaken by a reviewing court, when determining the appropriateness of a sentence of death, must reflect an application of the legal principles that bound the sentencer in the first instance. In this case, the Virginia Supreme Court ignored that simple maxim. Instead, it blindly applied the wrong rule of law -- a rule of law that would have been appropriate to determine a sentence of death in Florida, but which was not appropriate to determine a sentence of death in Virginia.

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[22]Strickland, 466 U.S. at 694.

2. The Fourth Circuit's error imposes on Williams a heightened burden under *Strickland*

To have misconstrued this particularized application of Strickland's general rule to Florida's "governing legal standard" -- namely, weighing -- to decide prejudice in a non-weighing state necessarily imposed a heightened burden on Williams to show prejudice from his trial counsel's deficient omission of crucial mitigating evidence. In a strict weighing state, the jury would have no discretion to choose life if the aggravators outweighed the mitigators. In a non-weighing state such as Virginia, however, the jury is not required to balance aggravating factors against mitigating factors or to perform any "weighing" function at all. To the contrary, after one or both of the statutory prerequisites to the imposition of the death penalty is proven, the jury has complete discretion to choose whether or not to impose a death sentence and may consider any evidence in mitigation in making that choice. Indeed, it could "impose a life sentence even if it was not convinced of the existence of any mitigating circumstance," Gilbert v. Moore, 134 F.3d 642, 657 n.15 (4th Cir.) (*en banc*), cert. denied, 119 S. Ct. 103 (1998) (emphasis added).

The distinction between a "weighing" analysis and a "non-weighing" analysis is thus "not one of 'semantics' . . . but [is one] of critical importance" to the outcome of the sentencing decision. Stringer v. Black, 503 U.S. 222, 231 (1992). Compare Parker v. Dugger, 498 U.S. 308, 318 (1991) (in Florida, a weighing state, "the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances"); Stringer v. Black, 503 U.S. 222, 225 (1992) (in Mississippi, a weighing state, to impose a sentence of death, the jury "must find at least one of the eight statutory aggravating factors, and then it must determine that the aggravating factor or factors are not outweighed by the mitigating circumstances"), with Tuggle v. Netherland, 516 U.S. 10, 14 (1995) (in a non-weighing state, "a constitutional error in the admission or exclusion of evidence" may well affect "the jury's

ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment"); Buchanan v. Angelone, 118 S. Ct. 757, 759 (1998) (in a non-weighing state, state must prove statutory aggravator but jury may disregard it in fixing the defendant's punishment and, if it believes "from all the evidence" that the death penalty is not justified, the jury must choose life imprisonment); Zant v. Stephens, 462 U.S. 862, 873-74 (1983) (in Georgia, a non-weighing state, "the jury is not instructed to give any special weight to any aggravating circumstances" or to "balance aggravating against mitigating circumstances pursuant to any special standard"; thus, the "finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion")(emphasis added); Jones v. State, 504 S.E.2d 822, 829 (S.C. 1998) (Finney, C.J., dissenting) (weighing of aggravating and mitigating circumstances for determining Strickland prejudice in postconviction proceedings is improper in a non-weighing state because "life may be imposed irrespective of . . . [any aggravating circumstances] and even in the absence of any mitigating circumstances"), petition for cert. filed Jan. 5, 1999.

Where, as here, the jury is not required under any circumstance to impose a sentence of death, id., the Fourth Circuit's approval of the Virginia Supreme Court's "weighing" of aggravators against mitigators imposed on Williams a "governing legal standard" that is not, in fact, the "governing legal standard" in Virginia for determining the appropriateness of a sentence of death. And, in so doing, the Fourth Circuit has determined that it is not enough for a habeas petitioner to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, but must show that the aggravating circumstances would not have been sufficient to outweigh the mitigating circumstances, a far different and harsher calculus.

In sum, requiring Williams to prove on postconviction review that which he was never required to prove to the sentencing jury -- namely, that the aggravating circumstances did not outweigh the

mitigating circumstances -- clearly imposes a heavier burden than is required by Strickland. The Fourth Circuit's error, borne of an expansive and impermissible interpretation of Strickland by the Virginia Supreme Court that the Fourth Circuit in its mode of undue deference (see section II, infra) fully accepted, denied Williams his Sixth Amendment right to counsel. Worse, the Fourth Circuit has embraced this legally unfounded approach to determining prejudice in other cases,[23] thus raising the specter of recurring and substantial constitutional errors that only this Court has the power to correct.

II. THE CIRCUIT COURTS ARE DEEPLY DIVIDED OVER THE PROPER INTERPRETATION OF THE AEDPA'S STANDARD OF REVIEW

The Fourth Circuit's refusal to find the Virginia Supreme Court's decision either "contrary to" or "an unreasonable application of" this Court's well-settled jurisprudence and, indeed, its effort to undermine the district court's recognition of the serious flaws in the Virginia Supreme Court's decision, is the obvious and direct result of its constricted and wholly unjustified interpretation of the AEDPA's standard of review. Believing itself compelled to defer to the state court's decision except under conditions that are, as shown below, virtually impossible to meet, the Fourth Circuit spurned the conclusion of the state trial court judge -- the same one who had originally approved Williams's sentence of death and who saw trial counsel's performance first-hand -- and the federal district court judge that, but for trial counsel's gross abdication of responsibility with respect to the presentation of mitigation evidence, there is a "reasonable probability" that he would not have been sentenced to death. As shown below, however, the constricted interpretation of section 2254(d)(1) adopted by the Fourth Circuit defies logic, eviscerates the statute, and does serious damage to the duty of federal courts to interpret and decide questions of constitutional law.

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[23] See, e.g., Plath v. Moore, 130 F.3d 595, 602 (14th Cir. 1997), cert. denied, 118 S.Ct. 1854 (1998); Fitzgerald v. Greene, 150 F.3d 357, 368 (4th Cir.), cert. denied, 119 S.Ct. 389 (1998); Barnes v. Thompson, 58 F.3d 971, 979 (4th Cir. 1995).

Moreover, as shown below, the Fourth Circuit's interpretation of the AEDPA's standard of review is at the extreme end of a notable split in the circuits on this issue and highlights the "interpretive conundrum of the statute." Green v. French, 143 F.3d 865, 870 (4th Cir. 1998). This split in the federal circuit courts will only worsen, not narrow, given the difficulty the courts have had in interpreting the AEDPA's standard of review. Indeed, as even the Fourth Circuit has conceded, "[c]orrectly defining 'contrary to' and 'unreasonable application of,' and distinguishing between the two terms for purposes of section 2254(d)(1), at first blush appears relatively simple"; "[u]pon reflection, however, it is evident that this appearance is deceptive, and that the intended meaning of these terms is not so clear at all." Green 143 F.3d at 869. See also Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059, 2068 (1997) ("in a world of silk purses and pigs' ears, [the AEDPA] is not a silk purse in the art of statutory drafting"); O'Brien v. Dubois, 145 F.3d 16, 20 (1st Cir. 1998) ("AEDPA is hardly a model of clarity" and "its standard of review provision is far from self-explicating"). Given the importance of this issue, and the need for stable and uniform application of the statute among the circuit courts and, particularly, to correct the Fourth Circuit's plainly unconstitutional interpretation of the AEDPA, it is imperative that this Court step in and provide authoritative guidance by granting certiorari.

A. It is the Role of the Federal Judiciary to Decide Issues of Constitutional Law and of this Court to Decide Generally Applicable Rules of Laws.

As it interprets the AEDPA's standard of review, the Fourth Circuit may not issue the writ:

> unless (a) the state court decision is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, 'the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts.'

163 F.3d at 865, (quoting Green v. French, 143 F.3d 865, 870 (4th Cir. 1998), cert. denied, 119 S. Ct. 844 (1999) (emphasis added)).

1. "Contrary to"

In the court's view, a decision is 'contrary to' precedent:

> only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite and irreconcilable with that reached in the precedent that addresses the identical issue.

Green v. French, 143 F.3d at 870 (emphasis added). See also Wright v. Angelone, 151 F.3d 151, 156 (4th Cir. 1998) (relying on Green for proposition that decision must be "in square conflict" with Supreme Court precedent to justify relief under "contrary to" prong of AEDPA); Fitzgerald v. Green, 150 F.3d 357, 362 (4th Cir.) (same), cert. denied, 119 S. Ct. 389 (1998).

This pinched interpretation relegates this Court to a pedestrian forum for case-by-case adjudications that will necessarily have no bearing on the resolution of any future case. Quite simply, this is because no two cases ever present both the "identical" issue and facts that are "indistinguishable in any material way from those on the basis of which the precedent was decided." Green, 143 F.3d at 870. Such an interpretation, of course, defeats the very purpose of this Court's existence, which is to establish rules and principles of general applicability to govern future cases. Moreover, the Fourth Circuit's interpretation of the "contrary to" clause will ultimately render the clause defunct because the empty review it provides will necessarily default into the "unreasonable application of" analysis rendering the "contrary to" clause nugatory in violation of a fundamental maxim of statutory interpretation.[24]

There is also a significant divergence of analysis between the Fourth and First Circuits on the proper interpretation of 28 U.S.C. § 2254(d)(1)'s "contrary to" language. Compare Green v. French, 143

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[24]The first rule of statutory interpretation is "'to give effect, if possible, to every clause and word of a statute.'" United States v. Menasche, 348 U.S. 528, 538-39 (1955) (quoting Montclair v. Ramsdell, 107 U.S. 147, 152 (1883)).

F.3d at 870 (opining that decision of Supreme Court governs a particular claim only if it was announced in a context both legally and factually "indistinguishable, in any material way" from the case before the habeas court) to O'Brien v. Dubois, 145 F.3d at 24-25 (explaining that a petitioner need not identify a factually identical precedent but rather must identify a Supreme Court case that provides an analytic framework designed to apply to a variety of factual contexts).

2. "Unreasonable Application of"

The Fourth Circuit's interpretation of the "unreasonable application of" clause suffers from different, but no less grave, infirmities. A state court decision, the court explained, is "objectively unreasonable" only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable. Williams, 163 F.3d. at 865, (quoting Green, 143 F.3d at 870 (emphasis added)). Said another way, if any jurist finds that relief is not warranted, a federal court is necessarily barred from granting relief because a single judge's disagreement with the decision to grant relief signifies that reasonable jurists do not all agree that the state court's decision was unreasonable.

Taken to its logical extreme -- not a distant journey here -- the Fourth Circuit's interpretation would prevent the writ from ever issuing if any reasonable jurist -- and one presumes that all jurists are reasonable -- were to conclude that the writ should not issue. Presumably, the pool of "reasonable jurists" to which the Fourth Circuit would defer includes all state court judges, because one must presume they are as "reasonable" as their federal counterparts. Thus, in any case in which one or more state judges voted to deny the writ, federal review would necessarily be barred because all reasonable jurists would not agree that the writ should be granted under applicable law. Of course, the only reason a case would be in federal court would be because relief had been denied in the state court. Thus, relief would be denied in every federal habeas case.

Giving every state jurist veto power over the grant of federal collateral relief in this manner vitiates the entire purpose of federal habeas review and nullifies the role of the federal judiciary to decide issues of constitutional law. See e.g Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Article III judges are "vested" with "judicial Power" that extends over all cases over which federal courts have jurisdiction and it is "emphatically the province and duty of the judicial department to say what the law is"); United States v. Klein, 80 U.S. (13 Wall). 128 (1871) (Congress's attempt to dictate to the Court a certain constitutional interpretation oversteps the required separation of powers between the legislative and the judicial branches of government). Moreover, in signing the AEDPA into law, the President made clear that section 2254(d), as amended, was not intended to "limit the authority of the Federal courts to bring their own independent judgment to bear on questions of law and mixed questions of law and fact"; otherwise, it "would be subject to serious constitutional challenge." Statement by the President Upon Signing the AEDPA of 1996 Into Law at 2-3 (April 24, 1996).

The Fourth Circuit's incorrect and unconstitutional interpretation of section 2254(d)(1), as articulated in Green v. French, 143 F.3d at 870, has been applied in a number of other cases in addition to this one. See, e.g., Fitzgerald v. Greene, 150 F.3d 357, 362 (4th Cir. 1998); Wright v. Angelone, 151 F.3d 151, 156 (4th Cir. 1998); Caldwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998); and Johnson v. Moore, 1998 WL 708691 (4th Cir. September 24, 1998).[25] All of these individual petitioners, and potentially many more, have been denied relief by the Fourth Circuit after having been unable to clear the appellate court's impermissibly high bar to federal review. Accordingly, review by this Court is essential.

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[25]We note that a petition for certiorari was filed in Johnson on January 19, 1999 and is currently pending before this Court.

B. There is a Split in the Circuits Over the Proper Interpretation of the "Unreasonable Application of" Prong of the AEDPA.

The Fourth Circuit's interpretation of the "unreasonable application of" clause of the AEDPA suggests a stark abdication of federal responsibility for the protection of rights guaranteed by the federal constitution. Likewise, the Fifth Circuit has defined the AEDPA's "unreasonable application" of clearly established federal law standard of review to mean that "reasonable jurists considering the question would be of one view that the state court ruling was incorrect." Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997) (emphasis added). To apply this principle illustrates its illogic. In the words of the Drinkard majority:

> [we have] unequivocally concluded that the instruction at issue did not place mitigating evidence of intoxication beyond the reason of the jury. Judge Garza [dissenting], on the other hand, has concluded that the challenged instruction removed the mitigating evidence of intoxication from the jury's consideration. It follows that when the jurists considering the state court ruling disagree in this manner, the application of the law by the state court is not unreasonable. The AEDPA therefore bars us from granting relief to Drinkard on this claim.

By parity of reasoning, one 'one dissent, including the dissent of a sole judge to an en banc majority's decision to grant the writ, would bar AEDPA relief because the existence of a dissent on either side of the question means that the proposed interpretation of federal law is not one "that reasonable jurists would all agree is unreasonable." Williams v. Taylor, 163 F.3d 860, 865 (4th Cir. 1998) (emphasis added). This ill-fated logic, which both the Fourth and Fifth Circuits share, has also been accepted by the Eleventh Circuit in Neelley v. Nagle, 138 F.3d 917, 924 (11th Cir. 1998), cert. denied, 119 S. Ct. 811 (1999), (quoting Drinkard, court adopts standard that under the AEDPA "a federal court can grant the writ 'only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists'").

The Fourth Circuit's constricted view of the AEDPA's standard of review is fundamentally at odds, however, with the First and Seventh Circuit's approach to this issue. In Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), cert. granted in part, 117 S. Ct. 726, judgment rev'd on other grounds, 117 S. Ct. 2059 (1997), for example, the Seventh Circuit reached a wholly different conclusion than the Fourth Circuit on the AEDPA's "unreasonable application of" clause. In asking "[h]ow much leeway does the 'unreasonable application' language create," the court answered

> [n]one on questions of interpretation. It does not authorize or permit state courts to deviate from the Constitution. Federal courts acting within their jurisdiction are always entitled to interpret the law independently. Section 2254(d)(1) as we read it does no more than regulate relief. It tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called 'unreasonable.'

96 F.3d at 870. When, then, is a state court decision "unreasonable?" As the Seventh Circuit continued to elucidate in Hall v. Washington, 106 F.3d 742 (7th Cir.), cert. denied, 118 S. Ct. 264 (1997) the "statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of severally equally plausible outcomes." But,

> [o]n the other hand, Congress would not have used the word 'unreasonable' if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents . . ., or so arbitrary, that a writ must issue.

106 F.3d at 749.[26] See also Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir.) (testing reasonableness of a state decision by "whether the determination is at least minimally consistent with the facts and circumstances of the case"), cert. denied, 118 S. Ct. 72 (1997).

The First Circuit, in O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998), was similarly disinclined to apply the narrow reading of the "unreasonable application of" clause adopted by the Fourth Circuit.

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[26]Notably, in Hall, the Seventh Circuit applied the AEDPA to find, on facts remarkably similar to the instant case, that petitioner's counsel's failure to prepare and present a mitigation case at the capital sentencing hearing was constitutionally ineffective under Strickland. See also, section II.C, infra.

The question to be asked, in the First Circuit's view, is only whether the state court's decision "appears objectively reasonable" (emphasis added) and, to the "extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." Id. at 25. In sum, while the First Circuit would not grant the writ under the AEDPA simply if it disagreed with the state court's decision or would have reached a different result, it nonetheless recognized that across-the-board deference, as advocated by the Fourth and Fifth Circuits, "may intrude impermissibly upon the federal courts' Article III power 'not merely to rule on cases, but to decide them.'" Id. at 21, (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995)).

Given the lack of clarity of the AEDPA, and the significant splits in analysis among the circuits, it is critical that the Court grant review to provide much-needed guidance on this issue. Such lack of clarity is particularly harmful to capital habeas petitioners in the Fourth Circuit who are subject to much narrower interpretations of both prongs of section 2254(d)(1) than such petitioners in other circuits. Given the high stakes for these petitioners, it is essential that the Court grant review.

C. Had the Fourth Circuit Applied the Governing Legal Principles Correctly in this Case, the Writ Would Have Been Granted and a New Sentencing Hearing Ordered.

As shown above, the Fourth Circuit's decision in this case illustrates the overreaching that was required in order for the Fourth Circuit to uphold the flawed decision of the Virginia Supreme Court denying Williams the writ and, concomitantly, to undermine the decision of the district court granting the writ. Had the Fourth Circuit evaluated the Virginia Supreme Court's decision with an eye toward its "objective reasonableness," see O'Brien v. Dubois, 145 F.3d 16, 25 (1st Cir. 1998), rather than with the unwarranted deference it felt constrained to apply under the AEDPA, and had it not applied a skewed

application of Strickland's prejudice prong, the only reasonable and defensible conclusion it could have reached would have been to grant the writ.

As the First Circuit in O'Brien explained, to the "extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue." O'Brien, 145 F.3d at 25. The following numerous decisions of other federal courts amply demonstrate the unreasonableness of the Virginia Supreme Court's decision in this case. See, e.g., Dobbs v. Turpin, 142 F.3d 1383, 1388 (11th Cir. 1998) (finding that failure to present evidence of petitioner's troubled childhood, including alcohol abuse and domestic violence in petitioner's childhood home was prejudicial); Collier v. Turpin, 155 F.3d 1277, 1293-97 (11th Cir.) (finding that counsel's failure to present evidence during sentencing phase of petitioner's family relationships and of petitioner's specific heroic acts was ineffective assistance); Smith v. Stewart, 140 F.3d 1263, 1270 (9th Cir.) (finding failure to discover any mitigating evidence at penalty phase to be ineffective assistance of counsel where counsel merely asked general questions of petitioner and his mother and "conducted none of the real probing for information that legal praxis assumes and even demands"; failure to introduce evidence of positive family relationships, including that petitioner was a loving father was prejudicial), cert. denied, 119 S. Ct. 336 (1998); Austin v. Bell, 126 F.3d 843, 848-49 (6th Cir. 1997) (finding that counsel's failure to investigate possible mitigating evidence, and failure to present testimony of family and friends who were available and willing to testify on the petitioner's behalf, so undermined the adversarial process as to render the petitioner's death sentence unreliable), cert. denied, 118 S. Ct. 1526 (1998); Groseclose v. Bell, 130 F.3d 1161, 1170 (6th Cir. 1997) (writ granted where trial counsel failed to present any meaningful mitigation evidence, including testimony of family members); Hall v. Washington, 106 F.3d 742, 749 (7th Cir. 1996) (counsel's decisions not to call witnesses deserve no deference under Strickland where counsel did not investigate

what witnesses testimony would be), cert. denied, 118 S. Ct. 264 (1997); Emerson v. Gramley, 91 F.3d 898, 906-07 (7th Cir. 1996) (prejudicial for trial counsel to have failed to conduct any investigation of possible evidence in mitigation and failed to introduce evidence of petitioner's low intelligence and childhood injury), cert. denied sub nom., Emerson v. Gilmore, 117 S. Ct. 1260 (1997); Antwine v. Delo, 54 F.3d 1357, 1365-68 (8th Cir. 1995) (counsel was ineffective for failing to effectively investigate and present evidence of petitioner's mental impairment at the penalty phase of capital trial); Hendricks v. Calderon, 70 F.3d 1032, 1044 (9th Cir. 1995) (trial counsel's failure to present readily available mitigation evidence concerning petitioner's abused childhood and mental problems "sufficiently undermines confidence in the fairness of the death verdict to satisfy the prejudice prong of Strickland"); Glenn v. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995) ("quite clear" prejudice where trial counsel failed to present mental history and evidence of defendant's near-retardation); Jackson v. Herring, 42 F.3d 1350, 1369 (11th Cir. 1995) (prejudice where evidence of "good character in [defendant's] relationships with her family," as well as abusive family life and positive employment history, was not presented to jury); Hill v. Lockhart, 28 F.3d 832, 845-47 (8th Cir. 1994) (counsel's failure to discover or present evidence of defendant's medical history rendered penalty phase fundamentally unfair); Wade v. Calderon, 29 F.3d 1312, 1323-25 (9th Cir. 1994) (attorney's almost complete failure to present mitigating evidence during penalty phase was ineffective assistance); Brewer v. Aiken, 935 F.2d 850, 858 (7th Cir. 1991) (reasonable probability that had jury been aware of defendant's low IQ and deprived background, it would have concluded that the "balance of aggravating and mitigating circumstances did not warrant death"); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991) (ineffective assistance of counsel not to present sympathetic evidence); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) (ineffective not to call a deputy sheriff as a character witness); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989) (prejudice where jury did not know that defendant was "a devoted father, husband and brother" and was

"a decent, loving man whose life was important to them"); Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (reasonable probability that introduction of evidence of brutal treatment and neglect during petitioner's childhood would have totally changed the evidentiary picture); Martinez-Macias v. Collins, 810 F. Supp. 782 (W.D. Tex. 1991) (ineffective assistance to forego investigation and use of family members' testimony without knowledge of what that testimony would be), aff'd, 979 F.2d 1067 (5th Cir. 1992); Mathis v. Zant, 704 F. Supp. 1062, 1065 (N.D. Ga. 1989) (defendant prejudiced where trial counsel failed to introduce evidence of an abusive, alcoholic father and defendant's mild retardation), appeal dismissed, 903 F.2d 1368 (11th Cir. 1990).

These decisions not only underscore the unreasonableness of the Virginia Supreme Court's decision, they illustrate graphically the "reasonable probability" that, but for trial counsel's substantial and inexcusable errors in presenting a mitigation case for Williams, he would not have been condemned to die. The Danville Circuit Court believed this to be true, as did the federal district court, and thus reached the only reasonable conclusion possible -- namely, that the writ should be granted and Williams given a new sentencing hearing.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case.

Respectfully submitted,

Brian A. Powers *
Ellen O. Boardman
Dinah S. Leventhal
O'DONOGHUE & O'DONOGHUE
4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(202) 362-0041 (telephone)
(202) 237-1200 (facsimile)

* Counsel of Record